Supreme Court, U.S.
FILED
JUN 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

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NO. 89-1852

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RAY STANLEY FURRH,
Petitioner,

v.

SABINE TOWING & TRANSPORTATION CO., INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

(i) Statement Of Proceedings And Disposition In The Court Below

Petitioner's application arises out of a Final Judgment entered on the 26th day of May, 1989 directing the entry of judgment in favor of Respondent Sabine Towing & Transportation Co., Inc. ("Sabine") and against Petitioner Ray Stanley Furrh ("Furrh"). Furrh, a seaman, brought this action on September 30, 1987 alleging that he suffered a back injury on October 25, 1985. Furrh contended that the injury was a result of the negligence of Sabine or the unseaworthiness of the vessel M/V

TITAN. The case was tried to the district court sitting without a jury on December 14, 1988. It was stipulated that Sabine had paid all maintenance and cure which was due. On May 26, 1989 the trial court entered a Memorandum Opinion, including Findings of Fact and Conclusions of Law, and a Final Judgment in favor of Sabine. The United States Court of Appeals for the Fifth Circuit affirmed the district court by written opinion dated February 6, 1990.

(ii) Statement of Facts

Furrh was employed by Sabine in 1983. (Vol. 2, p. 48)[1] During his initial service with the company he worked as a deckhand aboard the M/V AJAX. On December 7, 1983 he suffered an injury to his low back while manipulating a stripping wand aboard the AJAX. (Plaintiff's Exh. 12, Deposition of Ray Stanley Furrh, p. 40 and Vol. 2, p. 48)[2] Furrh was hospitalized and

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1. Citation to the Record on Appeal is made by identification of the document, where applicable, followed by the volume of the Record and the page number of the volume.

2. Citation to statements made by Furrh are to his deposition. The Plaintiff did not appear at trial. His testimony was submitted by deposition in spite of the lower court's extraordinary efforts to make accommodations otherwise. (Vol. 1, p. 151) Furrh's counsel first advised the district court that his client was in prison and petitioned for a writ of habeas corpus/ad testificandum. (Vol. 1, p. 73) Counsel then advised that Furrh could not afford to travel from the correctional facility to the site of trial and obtained a continuance so that additional testimony could be obtained by deposition. (Vol. 1, p. 75) The district court entered an order compelling the warden to produce Furrh at the correctional facility. (Vol. 1, p. 98) Without further explanation, however, Furrh's counsel opted to proceed to trial without obtaining additional deposition testimony. At the conclusion of the evidence, but before closing the record, the lower court again afforded Plaintiff's counsel the opportunity to submit his client's testimony in the form of affidavit, deposition or any other discovery mechanism. (Vol. 2, p. 54) Furrh again elected not to take advantage of the trial court's generosity.

treated by an orthopedic surgeon. (*Id.*) In October of 1984, shortly before the incident which makes the basis of this suit, Furrh reinjured his back while working on his car transmission. (Vol. 2, p. 16)

On October 25, 1984, the M/V TITAN was captained by Henry Reynolds. (Vol. 2, p. 8) Its crew included two deckhands, Tom Ellis and Furrh, as well as an engineer, Farrell Frazier. (*Id.*) The tug was instructed to proceed up the Neches Waterway, near Beaumont, Texas to shift a barge along a dock. (Vol. 2, p. 9) The barge did not belong to Sabine but rather was owned by Ottos Candies. (Vol. 2, p. 17) Upon arriving at the barge, the captain noticed that there was a crew of longshoremen working on the dock, apparently installing steel rails on the deck. (Vol. 2, p. 10) Captain Reynolds' job was to make-up to the barge and press it against the side of the dock. (Vol. 2, p. 12) The lines would be handled by the longshoremen. (Vol. 2, p. 18) Captain Reynolds made the M/V TITAN fast to the starboard side of the Ottos Candies barge. (Vol. 2, p. 12) He instructed his two deckhands to stay on the dock and supervise the longshoremen's line shifting. (Vol. 2, p. 18)

The two deckhands proceeded with their supervisory duties. Tom Ellis remained at the stern of the vessel while the Plaintiff proceeded to the bow. (Vol. 2, p. 27) Both Mr. Ellis and Furrh recalled that there was in fact a crew of longshoremen up on the dock, including a supervisor. (Plaintiff's Exh. 12, Deposition of Ray Stanley Furrh, p. 83 and Vol. 2, p. 33) Mr. Ellis testified that there were five or six lines of standard length which were securing the barge to the dock. (Vol. 2, p. 27) Furrh stated that there were only two lines, one at the stern,

and one at the bow. (Plaintiff's Exh. 12, Deposition of Ray Stanley Furrh, p. 73) Furrh testified that the bow line was more than 200 feet long and that since there were no other lines to adequately secure the vessel, he had to "double up" the line and secure it in at least two different places. (Plaintiff's Exh. 12, Deposition of Ray Stanley Furrh, pps. 81, 73) When the Plaintiff completed his portion of the work, he came down and stood by Mr. Ellis, who was near the kevel at the stern position. (Vol. 2, p. 38) Furrh told Ellis he had incorrectly tied the line. (Vol. 2, p. 36) Furrh bent over and retied it. (*Id.*) As he stood up, Furrh complained that he had injured his back. (*Id.*)

Ellis testified that during the course of the shifting he did not see Furrh handling any 200 foot line. (Vol. 2, p. 33) If Tom Ellis had seen anyone attempting this super-human task, he would have offered to help. (Vol. 2, p. 34) Furrh admitted that he did not ask anyone's assistance in handling the allegedly extra long line, nor did he report any deficiency to Mr. Ellis, the longshoremen or the captain of the vessel until after he claims to have injured his back. (Plaintiff's Exh. 11, Deposition of Ray Stanley Furrh, pps. 79, 87)

On October 25th, Furrh was admitted to St. Mary's Hospital, examined and discharged to the care of a private physician. (Defendant's Exh. 6, p. 8) He was treated by a Port Arthur, Texas orthopedic surgeon, Dr. Martin Haig, between October 29th and October 31, 1984. (*Id.*) Furrh "fired" the physician because he refused to provide him with the narcotic drug Demerol. (*Id.*, at p. 7) On October 31, 1984, Furrh returned to St. Mary's Hospital and demanded Demerol. (Defendant's Exh. 8, p. 58) Dr. Owens immediately discharged him.

(*Id.*) On November 1, 1984, Furrh was treated by Dr. McDonald, who released him to return to work. Since Furrh still complained of back pain, arrangements were made for him to be treated by Dr. Fukuda on November 6, 1984. (Plaintiff's Exh. 10) The doctor ordered a CT Scan and determined that Furrh suffered from spinal stenosis. (Plaintiff's Exh. 10, p. 8) He recommended surgery. (*Id.*) On November 13 through 20, 1984, Furrh was hospitalized, again at St. Mary's, and underwent a lumbar laminectomy. (*Id.*) Dr. Fukuda provided a follow-up office visit on January 11, 1985. (*Id.*) The patient failed to return for later scheduled follow-up visits. (*Id.*) Furrh went to see Dr. Davis for continued post-operative treatment on March 19, 1985. (Defendant's Exh. 7, p. 1) He failed to return for his scheduled April visit. (*Id.*)

Petitioner's counsel referred his client to a Houma, Louisiana orthopedic surgeon, Dr. Rhymes. Furrh was treated by Dr. Rhymes between March 13 and August 28, 1985. (Plaintiff's Exh. 12, Deposition of Dr. Rhymes, p. 21) He reported continuing back pain. (*Id.*) Furrh then proceeded to miss scheduled appointments over nearly a two year period. (*Id.*) During this two year medical hiatus, Furrh did not receive any pain medication and was not treated by any doctor. (*Id.*, at p. 23) He was finally treated again, and for the last time, by Dr. Rhymes on June 11, 1987. (*Id.*) Dr. Rhymes testified that Furrh reported subjective pain complaints, however he was unable to state a diagnosis within any reasonable medical probability. (*Id.*, at pps. 23, 31, 33)

Furrh was involved in two automobile accidents which are relevant to the injuries in question. In June of 1982, six months before his employment by Sabine, the seaman was in a serious collision in which he suffered a broken

nose and a low back injury. (Plaintiff's Exh. 11, Deposition of Dr. Rhymes, pps. 28, 29) On January 18, 1985, two months after back surgery, a car Furrh was driving was "rear ended", resulting in substantial property damage. (Defendant's Exh. 3 and Plaintiff's Exh. 11, Deposition of Ray Stanley Furrh, p. 48)

On September 5, 1988, Furrh was indicted by a United States Grand Jury on felony drug charges. (Defendant's Exh. 2) He pleaded guilty to distribution of methamphetamines and was sentenced to 16 years imprisonment by the United States District Court for the Eastern District of Texas on March 3, 1988. (*Id.*) This was Furrh's second felony conviction. He was convicted of burglary a few years before trial. (Defendant's Exh. 1)

SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari should be denied because it fails to meet even the threshold considerations of Supreme Court Rule 10.1. There is no claim that the result causes a conflict of opinion between two United States Courts of Appeal. Likewise, the Petition does not even allege that the district court or the court of appeals acted improperly. This is a very simple Jones Act case that was correctly decided by two courts and for which further judicial consideration is unwarranted.

ARGUMENT

Furrh's Petition for Writ of Certiorari should be summarily denied because it fails to meet the threshold considerations of review. The Petition may only be granted when it details special and important reasons therefor. Sup. Ct. R. 10.1. The pending application cites no special

or important reasons compelling its review. In fact, the Petition for Writ of Certiorari is simply a verbatim copy of the original brief filed on behalf of Plaintiff/Appellant Ray Stanley Furrh in the United States Court of Appeals for the Fifth Circuit.

A closer examination of this threshold issue reveals that the Petition expressly fails to address the guidelines set out in Rule 10. The most common ground, that a court of appeals has rendered a decision in conflict with another court of appeals, is not present here. The Petitioner makes no mention of such a conflict in his application. Likewise, the only other possibly applicable guideline, that a court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision, is conspicuously absent. Sup. Ct. R. 10.1(a). The Petitioner himself accurately characterizes the proceedings—"This is a very simple Jones Act case." Petition for Writ of Certiorari, page 17. It was tried to the district court without a jury. Contrary to the Petitioner's assertions, the trial court found that Furrh failed to meet his burden of proof in establishing liability. There was insufficient evidence upon which to base a finding of either negligence or unseaworthiness. Likewise, the district court determined that causation was lacking.

On appeal to the United States Court of Appeals for the Fifth Circuit, the Petitioner argued that there was some evidence of negligence, unseaworthiness and causation. All of this evidence, however, came from the deposition testimony of the Petitioner himself and was contradicted by the testimony of other witnesses. The court of appeals could only alter the trial court's findings if

it found that they were clearly erroneous. *Anderson v. Bessemer City,* 105 S.Ct. 1504, 470 U.S. 564, 84 L.Ed. 2d 518 (1985). Three fact witnesses, including the Petitioner, testified at trial, by deposition or otherwise. Two of the witnesses offered a plausible explanation as to the events which occurred that was different than Furrh's recollection. The fact finder, in choosing between those versions, can virtually never be clearly in error. *Amadeo v. Zant,* 108 S.Ct. 1771, 486 U.S. 214, 100 L.Ed.2d 249 (1988).

Nothing in the Petition for Writ of Certiorari even begins to raise a question as to the proprietary of the conduct of either the district court or the court of appeals. The Petition falls far short of showing any special or important reasons for Supreme Court review.

CONCLUSION

Sabine submits that the courts below were correct in entering Final Judgment in its favor and requests that all findings of the district court and the opinion of the United States Court of Appeals for the Fifth Circuit be affirmed.

Respectfully submitted,

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